Re Ley Boon Hee

HIGH COURT (KUCHING) — BANKRUPTCY PETITION NO 8 OF 1989
HAIDAR J
11 DECEMBER 1989

Bankruptcy — Bankruptcy notice — Validity of — Calculation of sum claimed — Sum in excess of amount due — Whether debtor able to pay judgment debt — Bankruptcy Act 1967, s 3

The judgment creditors applied by way of a bankruptcy petition to have the debtor adjudicated a bankrupt. The debtor opposed the petition on grounds that the sums claimed in the bankruptcy notice and petition were not consistent and specific and that he was able to pay the judgment debt.

Held, allowing the creditors' application:

(1) For a bankruptcy notice to be valid, the amount claimed must be specified. In the instant case, the amount claimed in the bankruptcy notice was in accordance with judgment and therefore complied with s 3 of the Bankruptcy Act 1967.

(2) The exclusion of half a month's interest from the petition was not fatal as the judgment debt was quantified in compliance with s 3 of the Bankruptcy Act 1967. In any event, if the creditor is so minded, any balance of a judgment, not demanded in the notice, could subsequently be proved in bankruptcy to the Official Assignee.

(3) It is sufficient if the judgment sum is quantified to a certain date and that is the sum which is required to be paid in accordance with the terms of the judgment. The Bankruptcy Act 1967 does not require that the sum to be paid be calculated to the date of the issue of the notice.

(4) The notice was not invalidated simply because the amount claimed exceeded the amount actually due, unless the debtor gave notice to the creditor that he disputes the validity of the notice on the ground of such a mistake. No such notice was given in the instant case and the notice was not invalid merely by reason of the excess.

(5) If the court is satisfied that the debtor is able to pay the judgment debt it may dismiss the petition. In the instant case the judgment had been obtained in January 1988 but the debtor had made no attempt to settle the debt. The court was not satisfied that he was able to pay the judgment debt.

[*Editorial Note*: The debtor has appealed to the Supreme Court vide Civil Appeal No 02-12-89.]

Cases referred to

1 *Low Mun* v *Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (folld)
2 *Ghazali bin Mat Noor* v *Southern Bank Bhd* [1989] 2 MLJ 142 (refd)
3 *Re Arunachalam, ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89 (folld)
4 *Re a Debtor* [1908] 2 KB 684 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3, 6

Kilat Beriak for the judgment creditors.
Cheng Yi (Miss) for the debtor.
Latip Mohamed for the Official Assignee.

Cur Adv Vult

Haidar J: Quality Concrete Sdn Bhd, the judgment creditor, filed a bankruptcy petition on 22 March 1989 against Ley Boon Hee (trading under the style and name of Ley & Sons Construction), the judgment debtor (encl 8). I heard the petition on 11 December 1989 wherein I made the receiving order and adjudication order again the debtor. The debtor appealed against my said order.

The debtor filed as notice of intention to oppose the petition under r 117 of the Bankruptcy Rules 1969 (encl 14) and filed an affidavit in support thereof. The debtor put forward four grounds in opposing the petition. The creditor filed an affidavit dated 4 July 1989 (encl 18) in reply to the affidavit of the debtor. The four grounds are:

(1) That the judgment sum, interest and costs should be quantified to the date of the bankruptcy notice, namely, 9 February 1989, and not 15 January 1989, as stated in the creditor's petition.
(2) That the judgment sum, interest and costs quantified to 15 January 1989, calculated mathematically, should be the sum of $184,569.14, and not the sum of $183,792.50, as stated in the creditor's petition.
(3) That the principal sum and interest (not taking into account the costs of $225) owing by him to the petitioning creditor is, in fact, the sum of $152,731.42 as standing on 31 January 1989, and not the sum of $183,567.50 (not taking into account the costs of $225), as stated in the creditor's petition.
(4) That he is able to pay the judgment sum, interest and costs immediately upon the realization of his assets, which he is actively proceeding with.

Ground (1)

It would seem clear from *Low Mun* v *Chung Khiaw Bank Ltd*[1] that for a bankruptcy notice to be valid within the provisions of 3(1)(i) of the Bankruptcy Act 1967 the amount in the bankruptcy notice must be quantified. This is obvious as the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the judgment debt and payable by him within the seven-day period. A look at the bankruptcy notice (encl 3) in this case clearly showed that the principal sum claimed is $126,094.14 with interest at $1,553.28 per month from 2 December 1985 and costs of $225 making a total sum of $183,792.50 as at 15 January 1989. It is thus clear, in my view, that the bankruptcy notice requiring the debtor to pay the judgment debt is in accordance with the terms of the judgment dated 15 January 1988 and had therefore complied with s 3(1)(i) of the Bankruptcy Act 1967. In that event the creditor is in a position to issue execution. It cannot be said therefore that the debtor did not know from the bankruptcy notice issued to him that he did not know what is being claimed to be due on the judgment debt and payable by him within the seven-day period.

It would seem not disputed that the half month's interest was not included in the sum of $183,792.50 claimed as per the bankruptcy notice issued on 9 February 1989. In my view, such exclusion is not fatal to the bankruptcy notice as the judgment debt is quantified in compliance with s 3(1)(i) of the Bankruptcy Act 1967. In any event, if the creditor is so minded, any balance of a judgment debt, not demanded in the notice, could subsequently be proved in bankruptcy to the Official Assignee under Part III of the Bankruptcy Act 1967 (see p 265 of *Low Mun*'s case[1]).

On the assertion by counsel for the debtor that the judgment sum due should be stated as *at the date the bankruptcy notice was issued*, ie 9 February 1989 and not the amount as quantified up to 15 January 1989 in the present bankruptcy notice, in my view, such an assertion is a fallacy as clearly the bankruptcy notice need only to quantify the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order. The bankruptcy notice falls squarely within s 3(1)(i) of the Bankruptcy Act 1967. The words 'at the date of the bankruptcy notice' in *Ghazali bin Mat Noor* v *Southern Bank Bhd*[2] were stated therein as a matter of expediency and it is sufficient in my view if the judgment sum is quantified to a certain date and that is the sum which is required to be paid in accordance with the terms of the judgment within the seven-day period. Further, s 3(1)(i) of the Bankruptcy Act 1967 does not expressly require that the sum to be paid must be as at the date the bankruptcy notice is issued. This ground of objection therefore failed.

Grounds (2) and (3)

Grounds (2) and (3) can be conveniently dealt with together. As I said earlier there is clearly an omission to include a half month's interest in the bankruptcy notice and further the debtor claimed that the actual amount due is $152,731.42 as at 31 January 1989 (see exh LBH1). The short answer to the grounds raised by the debtor can be found in proviso (ii) to s 3(2) of the Bankruptcy Act 1967 wherein it is stated that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake. *No such notice was given by the debtor in this case.* In this respect the case of *Re Arunachalam, ex p Indian Overseas Bank Ltd*[3] may be of assistance where Chang Min Tat J (as he then was) said at p 90:

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid, merely by reason of the excess. Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso to s 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment creditor could not have issued execution: *In re Child, ex p Child* [1892] 2 QB 77. (Emphasis added.)

With respect, the case of *Re A Debtor*[4] relied on by counsel for the debtor is not applicable here because of the proviso to s 3(2)(ii) of our Bankruptcy Act 1967. Towards this end, Chang Min Tat J (as he then was) in *Re Arunachalam*,[3] said at p 90:

> The proviso was introduced in England by s 16 of the 1913 Act so that where such notice as is referred to is given, the position in law is the same as in England before 1913, and as in Singapore which has not a similar proviso. Conversely, where no such notice is given, *then any English decision prior to 1913 is not applicable.* The law would thens be as in Singapore and as in England after 1913. (Emphasis added.)

I am further fortified in my view that the case of *Re A Debtor*[4] is not applicable in this case by referring to *Williams and Muir Hunter on Bankruptcy* (19th Ed) where the footnote at p 33 states:

> *Re Durrance* [1973] 1 WLR 733 sub nom *Re a Debtor, ex p Durrance* v *Hungerford RDC* [1973] 1 All ER 797, where no notice of excess demand had been given. Prior to the introduction, by the 1913 Act, of what is now proviso (ii), a notice demanding a greater amount was liable to be held bad and incapable of amendment, as in *Re a Debtor* [1908] 2 KB 684;

As I said earlier no such notice is given by the debtor in this case and as such I ruled that the bankruptcy notice is not invalid merely by reason of the mistake or excess.

Ground (4)

Section 6(3) of the Bankruptcy Act 1967 states, inter alia, that if the court is satisfied by the debtor that he is able to pay his debts, the court may dismiss the petition. It implies therefore the burden is on the debtor to satisfy the court that he is able to pay his debts. To support his ability to pay the debts, the debtor as per para 7 of his affidavit set out the properties belonging to himself and his father and the two pending civil suits.

In respect of his property, lot 1035 Block 218 Kuching North Land district, the said property is subject to a memorandum of charge No L10826/1985 for a sum of $170,000. The debtor failed to reveal the current statement of account or the redemption statement and neither is a valuation report of the property produced. Hence there was no evidence to support the alleged residual value of the said property. With respect it is a mere speculation.

As for the other property belonging to his father, the property is also charged vide memorandum of charge No L2448/1988 for a sum of $150,000. Again the debtor failed to reveal the current statement of account or the

redemption statement and neither is a valuation report in respect of the property produced. Further, no affidavit of the debtor's father is filed giving his consent as alleged by the debtor. With respect, in the absence of supporting evidence, it is a mere speculation!

As to the two civil suits relied on by the debtor, the two civil suits are still pending and the debtor may succeed or fail and it does not help him on any way to show that he is able to pay his debts. It is purely speculative.

In the present case, judgment was entered on 15 January 1988 which is almost two years ago. If the debtor is genuine and able to settle the debt he could very well have done so much sooner as the debt has been outstanding for almost two years.

In the result I was of the view that the grounds relied on by the debtor to oppose the petition have no merits at all for the reasons set out by me and the debtor clearly committed an act of bankruptcy and in the circumstances the proper order I should make was to grant the receiving order and adjudicating order and ordered so accordingly as prayed.

Order accordingly.

Solicitors: *Chew, Jugah, Wan Ulok, Goh & Co Advocates; Cheng & Associates Advocates.*

Reported by *Mathavan Devadas*

Public Bank Bhd v Pengarah Tanah & Galian & Anor

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 25-10 OF 1989
MOHTAR ABDULLAH JC
22 JUNE 1989

Land Law — Registrar's caveat — Appeal against registrar's decision — Registrar entering caveat at request of Inland Revenue Department — Caveat entered after charge in favour of plaintiff registered — Whether appeal against decision of registrar must be made within three months from date of communication of decision to enter caveat or from date of refusal of application for cancellation of caveat — Whether appeal time barred — National Land Code 1965, ss 321(3) (b), (c) & 418

The plaintiff was the registered chargee of the land in question. Following the creation of the charge, a registrar's caveat was entered by the Registrar of Titles at the request of the Inland Revenue Department. The notice of entry of the registrar's caveat was received by the plaintiff on 20 October 1988. The plaintiff's request to the Registrar of Titles to have the caveat removed was rejected on 27 December 1988. On 29 January 1989, the plaintiff filed an appeal to the High Court under s 418 of the National Land Code 1965 against the decision of the Registrar of Land Titles. The second defendant, the Director-General of Inland Revenue, objected to the application of the plaintiff contending that it was time barred.

Held, dismissing the plaintiff's appeal:

(1) In the instant case, s 321(3)(b) and the second limb of para (c) did not apply as there was no application for the cancellation of the caveat by the proprietors of the land in question. The plaintiff was not the proprietor of the land and consequently had no right to apply for the cancellation of the caveat under para (b). The second limb of para (c) did not arise at all.

(2) By virtue of s 418, the time limited for appeal against the order of the registrar is three months from the date of communication of the decision of the registrar. In the instant case, the decision of the registrar was the decision to enter the caveat and not the decision to refuse the application for cancellation of the said caveat since s 321(3)(b) and the second limb of para (c) were not relevant. As the plaintiff's appeal under s 418 was entered on 29 January 1989, it was filed out of time and was consequently time barred. The second objection was, accordingly, upheld.

[*Editorial Note*: The plaintiff's appeal to the Supreme Court vide Civil Appeal No 01-35 of 1989 was heard on 16 April 1990 and the court (comprising Hashim Yeop A Sani CJ (Malaya), Gunn Chit Tuan and Jermuri Serjan SCJJ) dismissed the appeal.]

Legislation referred to
National Land Code 1965 s 321(3)(b), (c), 418

Tan Kiah Teck for the plaintiff.
Zulkefli bin Ahmad Makinuddin (State Legal Adviser, Johore) for the first defendant.
Balia Yusof bin Wahi for the second defendant.

Cur Adv Vult

Mohtar Abdullah JC: The notice of entry of the registrar's caveat dated 29 September 1988 in Form 19A was received by the plaintiff on 20 October 1988 as admitted in para 6 of the affidavit of Chew Sooi Hin, the manager and attorney of the plaintiff. The plaintiff appealed to the registrar by letter dated 21 December 1988 and the registrar rejected the plaintiff's request on 27 December 1988.

By virtue of s 321(3), a registrar's caveat shall continue in force until it is cancelled by the registrar:

(a) of the registrar's own motion; or
(b) on an application in that behalf by the proprietor of the land affected; or
(c) pursuant to any order of the court made on an appeal under s 418 against the registrar's decision to enter the caveat, or against the registrar's refusal of any application for its cancellation under para (b).

Paragraph (b) and the second limb of para (c) of s 321(3) do not apply in the present case as there is no application for the cancellation of the said caveat by the proprietors of the land in question. The plaintiff is not the proprietor of the land in question, and consequently has no right to apply for the cancellation of the caveat under para (b). The second limb of para (c) does not arise at all.

By virtue of s 418, the time limited for appeal against the order of the registrar is three months from the date of